No. 80-833

In The

Supreme Court Of The United States

OCTOBER TERM, 1980

LOCAL UNION NO. 35 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Petitioner,

v.

CITY OF HARTFORD, CITY MANAGER OF THE CITY OF HARTFORD, COMMISSION ON HUMAN RELATIONS OF THE CITY OF HARTFORD, CONTRACT ENFORCEMENT COMMITTEE OF THE CITY OF HARTFORD, AND RONALD FLETCHER, INDIVIDUALLY AND AS SENIOR FIELD REPRESENTATIVE OF THE COMMISSION ON HUMAN RELATIONS OF THE CITY OF HARTFORD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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REPLY BRIEF

On pages 6-7 of the defendants' (hereinafter collectively referred to as "City") Brief In Opposition it is stated that the "record" shows that in 1969 blacks employed as skilled electricians in Connecticut was only 0.7% and that this confirms that the Union was one of the trade unions from which minority craftsmen had been excluded.

The above constitutes an argument first raised in the brief in opposition. The City never before claimed that the Union had been guilty of exclusionary practices.

The new claim does not withstand analysis.

The City in said new claim admits that the Union was only one of several electrical trade unions in Connecticut but the City omits to mention that the "record" to which it refers does not indicate what was the minority composition of the Union or of any other separate entity. Notwithstanding that logical gap, the City makes the unjustified conclusion that the generalized 0.7% figure proves that the Union excluded minority craftsmen. The proof is not only not self-evident but is logically absurd. "Proof" by means of guilt by association proves nothing except the twisted "logic" of the accuser.

The 0.7% figure is found in a study entitled "Blacks in the Construction Trades and Effect on Connecticut Economy, June 1970 Labor Education Center the University of Connecticut" which was attached to one of the City's affidavits submitted to the Trial Court.

On page 17 of the study it was stated that in the summer of 1969 the study's field staff visited 301 construction sites to obtain data on the number and proportion of blacks employed by occupation. Six Thousand

Five Hundred Eighty workers were found employed at those sites. [It was also stated that in June 1969 the total number of on site workers actually was 45,900.] The on site visits revealed that 0.7% of the electricians were black. The total number of electricians covered in the survey was 593. However, the study also indicated that in 1969 the number employed as electricians was 2,100. The study does not indicate what was the minority composition of the remaining 1,507 electricians. There is no indication that the 593 "sample" was statistically valid such that any generalization from that grouping validly could be made.

The study also indicates in 1969 that there were seven separate local electrical trade unions in Connecticut. The study does not list the locals separately nor does it indicate the minority distribution in any of them individually. Thus, there was no indication in the study as to what was the minority distribution in 1969 in Local 35. There existed no proof in the study that the minority membership in Local 35 was 0.7%.

The City studiously fails to mention other information contained in the above study. For example, on page 2 of the study it is stated: "The study was unable to find any overt cases of discrimination against blacks in the entry process." Also, on pp. 81-82 of said report it is stated: "A program for assisting minority group workers enter the electrician field has been in effect in the Hartford area since last September [1969]. This is a joint effort between the Urban League and the Joint Apprenticeship Council. The main feature of this is the special recruitment effort and the setting aside of a number of apprentice slots for minority group youths.... The council expects to open 50 apprentice opportunities next September with special preference for minority group youths." It can hardly be argued that a program in which the Urban League participates is in any way discriminating against minorities. It also should be noted that the above program was initiated in 1969. The City makes no claim that said program which continues

to the present day does not more than satisfy the objectives of any equal opportunity law requirements. The City makes no such claim because it cannot. So it ignores the above and then makes an unsupported outcry about exclusion at the entry level.

The City also filed with the Trial Court as part of one of their affidavits a report entitled "Manpower Information For Affirmative Action Programs 1973 Hartford Labor Market Area Prepared by the: Connecticut Labor Department...." This report asserts that in 1970 in the Hartford Labor Market Area, which included Hartford and surrounding municipalities, minorities composed 8.6% of the labor force. [Table 2] The City ignores the implications of said statistic. Why did it ignore it? Because Local 35's membership is 7.45% minority, but since the 7.45% figure is so close to the 8.6% figure the City refrains from making any comparison between them out of an obvious fear that it would undercut the new attack they have launched against the Union. Obviously, the difference between an 8.6% figure and a 7.45% figure is statistically insignificant and cannot serve as any basis for proof of discrimination.

On page 8 of its Brief in Opposition the City claims that in 1970 Hartford's population was 35.5% minority. But that figure is irrelevant because the City's affirmative action Ordinance and Plan are keyed to the region surrounding Hartford where it purported to discover discrimination and was not solely concerned with Hartford.

Other figures submitted to the trial court, but presently ignored by the City, belie the credibility of the new attack on the Union. The above report states that of the total of all craftsmen employed in the Hartford Labor market area 11% were minority persons. This is in excess of the 8.6% minority composition of the labor force and, to borrow from the "logical" premises of the defendants, this "proves" that craft exclusion did not exist in the Hartford Labor market area.

The point of this discussion is to demonstrate that the new attack by the City is not only statistically unsupported but is also intellectually meaningless.

The Union will not burden the Court with further examples of the City's playful regard for statistics since the above suffices to demonstrate the *modus operandi* of the City's approach. A quote now may well be in order, viz.: " 'too many...[defendants] use statistics as a drunk man uses a lampost - for support, and not illumination.' " Antieau, *Federal Civil Rights Acts*, sec. 149.5. (pocket part, July 1977, p. 249). The City's *modus operandi* is based on the theory of *guilt by association*. None of the statistics used by the City pertain specifically to the Union but yet the City feels free to particularize from the general to support its new claim that the Union is guilty of minority exclusion. This is yet another manifestation of the City's long held basic premise which underlies its Ordinance and Plan, namely, that mere association with an allegedly exclusionary group of unions and contractors is solely sufficient to besmirch the record of each and every entity in the group. This speculative leap is contrary to basic Constitutional principles and protections, e.g., Due Process.

On page 7 of their Brief In Opposition, defendants seek support for their position by citing Justice Brennan's dicta in *Weber* that "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusions a proper subject for judicial notice." With all due respect to Justice Brennan, his dicta is not applicable to Local 35. In our opinion Justice Brennan did not and nor should any other judge, particularize from such a general proposition so as to rule that generalized findings of craft exclusion among many unions *proves* that any particular union has engaged in exclusionary practices. And even if a judge were to be so inclined he would have to be careful not to run afoul of Federal Rule of Evidence 201 which requires that before judicial notice may be taken of *adjudicative* facts a party is entitled to an opportunity

to be heard. In this case it has never been *adjudicated* either administratively, legislatively or judicially that Local 35 has excluded minorities.

What we are confronted with in this case are "legislative facts" which are, illogically and, thus, illegally, being used to perform the role of adjudicative facts. See, *Supplement to Moore's Federal Practice Rules Pamphlet, Part 2, Federal Rules of Evidence Annotated,* 1975, p. 13. Legislative facts have relevance to legal reasoning and the lawmaking process and are utilized where a court or other body develops law or policy. "Legislative facts are often general and do not concern the immediate parties.... [W]henever a tribunal engages in the creation of law or of policy, it may need to resort to legislative facts.... The exceedingly practical difference between legislative and adjudicative facts is that, apart from facts properly noticed, the tribunal's findings of adjudicative facts must be supported by evidence, but findings or assumptions of legislative facts need not be, frequently are not, and sometimes cannot be supported by evidence." Davis, *Administrative Law Text, Hornbook Series,* 1959 ed., p. 272.

The finding[1] underlying the City's Ordinance was a legislative one and purported to state only legislative facts. As such, the finding was general in nature and was not concerned with the Union as an immediate party. The City has admitted as much. See, *Petition For Writ of Certiorari,* Statement of Facts, p. 11 ["...the City conceded that 'The affirmative action ordinance is not directed against Local Union No. 35....' "] However, in

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[1]The statement on pages 5-6 of the Brief In Opposition that "The petitioner neither challenged those findings, nor questioned the propriety of the Ordinance itself." calls for a response. This is because the quoted statement does not fully report the events at trial and, thus, is inaccurate. The inaccurary is sufficiently demonstrated by a reference to the discussion on pages 8-10 in the Petition For Writ of Certiorari which the defendants have forgotten to mention.

order to permit the City or to require the Union to run afoul of the statutory and Constitutional rights of the members of the Union's referral list there must first be established facts of an adjudicative nature establishing that the Union was guilty of past discrimination to justify the type of racial preference remedy utilized in this case. Since no such adjudicative facts were properly found by the City or any court below, the racial preference remedy effectively enforced in this case was unjustified and illegal.

The process of a legislature by which it utilizes legislative facts as supportive of a policy decision may well be by a resort to general studies as is the claim made by the City in this case. But although a legislature may deem such sources sufficiently reliable for it to reasonably give weight to their contents, the truth of such contents as they may be claimed to pertain to a particular party or case, are not thus established. Such reports may not be used to show what the facts were but only what was reported to the legislature. *McCormick, Evidence, Hornbook Series*, 1954 ed., sec. 329. The new attempt by the City to so use such studies to justify a non-existent adjudicative type of finding against the Union finds no support in the law.

Respectfully submitted,

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